(13)
Supreme Court, U.S.
FILED
FEB 18 2003
CLERK

No. 02-479

IN THE

Supreme Court of the United States

MEDICAL BOARD OF CALIFORNIA,
Petitioner,

v.

MICHAEL J. HASON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT

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47 pp

QUESTION PRESENTED

May state governments be sued for violating Title II of the Americans with Disabilities Act, which prohibits discrimination against individuals with disabilities in government "services, programs, or activities"? More specifically, is Title II of the Americans with Disabilities Act a proportionate and congruent means to prevent and remedy pervasive violations of the constitutional rights of people with disabilities that deny equal access to the basic functions of state governments?

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The Medical Board of California denied Dr. Michael J. Hason a medical license because of his history of depression.[1]

[1] Because the District Court granted the defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the allegations of the plaintiff's complaint must be taken as true. *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957). Petitioner, Medical Board of California, asserts facts in its Statement of the Case which have no support in the record of this case and are false. For example, in an effort to tarnish Dr. Hason's qualifications and capabilities as a physician, the Medical Board says that he was denied a medical license because of a "history of untreated mental illness and multiple drug dependency." Pet. Br. at 6. However, Dr. Hason's complaint alleges, and it is undisputed, that he was receiving treatment for depression at the time he was denied a medical license. Complaint, ¶¶ 29, 30, App. to Cert. Pet. at 47; J.A. at 20. As the Court of Appeals observed: "Dr. Hason's complaint also alleges, however, that by the time of the Medical Board's decision he had received treatment for his

A graduate of Yale College and New York Medical College, Dr. Hason received a medical license in New York and worked successfully as a physician at St. Vincent's Hospital, Bridgeport, Connecticut, 1991-1992, the State University of New York at Stony Brook, 1993-1994, and VA Medical Center in Los Angeles, California, 1994-1995. App. to Cert. Pet. at 46.

In 1995, Dr. Hason applied for a medical license in California. In 1998, the California Medical Board denied Dr. Hason's application for a medical license based on his history of depression. The Administrative Law Judge stated that Dr. Hason should continue his therapy and reapply for a license. J.A., at 20.

Dr. Hason filed a *pro se* complaint in federal district court on April 21, 1999, seeking injunctive relief and monetary damages for violations of his rights under the United States Constitution and the Americans with Disabilities Act ("ADA"), as well as state tort claims. App. to Cert. Pet. at 37. The District Court accepted a Report and Recommendation from a United States Magistrate Judge and granted the defendants' motion to dismiss, concluding that neither state officers nor the state government could be sued for injunctive or damage relief because of the Eleventh Amendment. App. to Cert. Pet. at 15, 17, 19-23. The District Court also held that there was no cause of action under Title II of the ADA for discrimination by state governments based on disability in issuing a medical license. *Id.*

The United States Court of Appeals for the Ninth Circuit reversed the District Court, holding that (1) state officers may be sued for injunctive relief; (2) Title II of the ADA

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disability and was capable of practicing medicine." App. to Cert. Pet. at 11. Moreover, there is nothing in the record of this case supporting the claim that Dr. Hason suffered from "multiple drug dependency." No such statements appear in the Administrative Law Judge's ruling denying Dr. Hason a medical license, J.A., at 20, and further the assertions are untrue.

represents a permissible exercise of Congress's power pursuant to section five of the Fourteenth Amendment and could be used to sue the state government; and (3) discrimination against individuals with disabilities in medical licensing constitutes "services, programs, or activities" of the state within the meaning of Title II. App. to Cert. Pet. at 1. The Court of Appeals denied the Medical Board's petition for *en banc* review. App. to Cert. Pet. at 26.[2]

SUMMARY OF ARGUMENT

Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, is different from other statutes that this Court has analyzed as to whether state governments may be sued for violation of federal laws. Title II, unlike the Age Discrimination in Employment Act, 29 U.S.C. § 623, or Title I of the Americans with Disabilities Act, 42 U.S.C. § 12111, or the Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1)(D), is directed exclusively at state and local governments acting in their sovereign capacities. While these other statutes involve employment decisions, the unambiguous purpose of Title II is to protect the rights of millions of Americans with disabilities to participate on a non-discriminatory basis in the central functions of state and local governments. Title II exists to ensure that individuals with disabilities have access to their government in the same way as other citizens. As this Court powerfully observed: "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996).

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[2] The Medical Board sought certiorari as to the second two issues, whether state governments may be sued for violating Title II and whether discrimination in licensing is within the scope of Title II. This Court, however, granted certiorari limited to the first question.

The Age Discrimination in Employment Act and Title I of the ADA involve discrimination that receives only rational basis review under this Court's equal protection jurisprudence. In sharp contrast, Title II of the ADA involves protecting fundamental rights—in areas such as voting, access to the courts, freedom from unjustified confinement, and travel—where courts traditionally have applied strict scrutiny.

Moreover, unlike the employment context, an extensive legislative record documented a long and sorry history of pervasive state discrimination against individuals with disabilities in the areas covered by Title II. Title II is therefore most analogous to the Voting Rights Act, 42 U.S.C. § 1971, *et. seq.*, which this Court in *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356, 373-374 (2001), identified as the model of a permissible enactment under section five of the Fourteenth Amendment. Title II and the Voting Rights Act share in common proscriptions against the denial of fundamental rights by governmental bodies upon findings of pervasive discrimination. They are about nothing less than protecting the capacity of a historically disadvantaged group to participate in and have access to their government.

This Court has held that "Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority." *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. at 363 (citation omitted). Title II satisfies these criteria. There is no dispute that the ADA, 42 U.S.C. § 12202, expressly authorizes suits against state governments. *Id.* at 363-364 (noting that the ADA unequivocally authorizes suits against state governments).

In evaluating whether Title II is within the scope of Congress's section five authority, this Court has prescribed three questions: First, what are the constitutional rights at issue?

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. at 365. Second, has Congress identified a "history and pattern of unconstitutional" violations of these rights? *Id.* at 368. Third, is the federal statute "congruent and proportional to the targeted violation"? *Id.* at 374.

First, Title II is directed at preventing and remedying violations of the fundamental constitutional rights of people with disabilities which are protected by the First, Fourth, Fifth, Sixth, and Fourteenth Amendments. In *Board of Trustees of the University of Alabama v. Garrett* and *Board of Regents v. Kimel*, 528 U.S. 62 (2000), this Court reviewed the congruence and proportionality of congressional legislation in areas that trigger only rational basis review. This case arises in a very different context. Title II is directed at deterring and compensating violations of rights that have long been regarded as fundamental. These include the right to vote, *see, e.g., Dunn v. Blumstein,* 405 U.S. 330, 336-37 (1972); the right to travel, *see, e.g., Saenz v. Roe*, 526 U.S. 489, 500 (1999); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); the right to be free from unjustified confinement, *see, e.g., Youngberg v. Romeo*, 457 U.S. 307, 384-388 (1982); the right to marry, *Zablocki v. Redhail*, 434 U.S. 374, 384-88 (1978), to procreate, *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942), and to have custody of one's children, *Stanley v. Illinois,* 405 U.S. 645, 651-53 (1972).

Second, Congress, as a basis for enacting Title II, extensively documented pervasive constitutional violations against people with disabilities with regard to each of these rights, as well as in many other areas where access to basic government services, programs, and activities was unconstitutionally denied. The text of Title II expressly states congressional findings that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and

access to public services." 42 U.S.C. § 12101(a)(3). Congress, within the statute itself, characterized the discrimination against individuals with disabilities as "pervasive" throughout the nation. 42 U.S.C. § 12101(a)(2). In extensive hearings and Commission reports, Congress repeatedly detailed and often quantified extensive unconstitutional acts against individuals with disabilities with regard to fundamental rights. Congress also found arbitrary and irrational discrimination against the disabled in every facet of government services, programs, and activities, including licensing, the focus of this case. 42 U.S.C. § 12101(a)(5) ("exclusionary qualification standards" are a continuing form of discrimination against people with disabilities.)

Finally, Title II is "proportionate" and "congruent" to preventing and remedying the constitutional violations that Congress documented. The law "[r]espond[s] to a history of widespread and persisting deprivation of constitutional rights." *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 640 (1999). It does so in a carefully calibrated fashion. Title II is limited to protecting individuals who are "otherwise qualified," 42 U.S.C. § 12132(b)(5)(A)-(B), by virtue of "meet[ing] the essential eligibility requirements for . . . the participation in the programs or activities provided by a public entity." 42 U.S.C. § 12131(2). The statute is narrowly tailored in that it requires only that the government act "reasonably." Title II is explicit that public entities are not required to make modifications that are unreasonable. *Olmstead v. L.C.*, 527 U.S. 581, 603 (1999). Indeed, it is difficult to imagine any narrower statute that Congress could have written to address the pervasive constitutional violations that it found to exist across the country.

ARGUMENT

STATE GOVERNMENTS MAY BE SUED FOR VIOLATING TITLE II OF THE AMERICANS WITH DISABILITIES ACT BECAUSE THE LAW IS PROPORTIONATE AND CONGRUENT TO PREVENTING AND REMEDYING CONSTITUTIONAL VIOLATIONS BY STATE GOVERNMENTS

A. The Inquiry: Is Title II a Proportionate and Congruent Means to Prevent and Remedy Constitutional Violations?

This Court has held that "Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority." *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. at 363 (citation omitted). The Americans with Disabilities Act unequivocally authorizes suits against state governments. The Act states: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in a Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202.

The issue in this case therefore is whether this authorization of suits against states is constitutional; that is, whether Title II lies within the scope of Congress's power under section five of the Fourteenth Amendment. In a series of recent decisions, this Court has held that a statute constitutes an appropriate enactment under section five, and thus may be used to sue state governments, where Congress has documented a pattern of unconstitutional conduct by the states, and where the remedy provided by Congress is congruent and proportionate to the scope and nature of the identified constitutional violations. *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. at 374; *Kimel v. Florida*

Board of Regents, 528 U.S. at 81-82; *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. at 639-40; *City of Boerne v. Flores,* 521 U.S. 507, 520, 525 (1997).

The State of California seeks to materially change the inquiry so as to ask only whether "Congress exceeded its Fourteenth Amendment powers with respect to the specific activity at issue—professional and vocational licensing—rather than considering Title II of the ADA in toto." Pet. Br. at 14. In other words, the State argues that the question is not whether Title II of the ADA is within the scope of Congress's section five powers, but instead, whether the prohibition of discrimination against individuals with disabilities in medical licensing is a lawful exercise of Congress's authority under the Fourteenth Amendment based on the legislative history of the ADA. The State's proposed approach would significantly change the law and impose dramatic and inappropriate new limits on congressional authority.

First, the State's proposed approach misconceives the question. The issue is whether this statute, Title II of the ADA, is within the scope of Congress's section five authority. No decision of this Court—or any court—ever has held that a constitutional statute cannot be used for a specific application clearly embraced within the law unless Congress made specific findings as to that particular application. Indeed, in each of its recent cases concerning whether a federal law can be used to sue state governments, this Court always has focused on whether the statute, not just a particular application of the law, fits within Congress's section five powers. *See, e.g., Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. at 364 (emphasis added) ("Accordingly, the ADA can apply to the States only to the extent that the *statute* is appropriate § 5 legislation.")

Second, the State's approach, requiring that each form of discrimination and violation of rights prohibited by the law be

specifically documented by Congress to involve pervasive constitutional violations, would greatly and unduly limit Congress's authority. This Court has emphasized that "[i]t is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference." *City of Boerne v. Flores*, 521 U.S. at 536 (citation omitted). This power would be vastly reduced if an otherwise constitutional law could be applied only to the specific areas that Congress explicitly identified and proved to be subject to pervasive discrimination.

Under the State's approach, a law that was otherwise clearly constitutional under Congress's section five powers could not be applied even against unquestionably unconstitutional state conduct if Congress had not proven pervasive unconstitutional actions as to that precise type of conduct. For example, if Congress found and thoroughly documented widespread race discrimination by state governments and enacted a law prohibiting states from discriminating based on race in their services, programs, or activities, that law could not be applied against race discrimination in medical licensing or any other area without specific Congressional findings as to each and every application. New activities of state governments, not existing or foreseen at the time a statute was adopted, could not be regulated under the law, even where the broad subject area was encompassed by the law's proscriptions and was otherwise supported by sufficient congressional findings.

The State's formulation is irreconcilable with this Court's repeated holding that Congress, when acting under section five, can go further than just what the Constitution prohibits. As this Court has stated: "Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that

which is not itself forbidden by the Amendment's text." *Trustees of the University of Alabama v. Garrett*, 531 U.S. at 365 (citation omitted); *Kimel v. Florida Board of Regents*, 528 U.S. at 81; *City of Boerne v. Flores*, 521 U.S. at 536. This Court has stressed that Congress may act under section five to prevent and remedy constitutional violations "even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the states." *Lopez v. Monterey County*, 525 U.S. 266, 282-83 (1999) (citation omitted). But if the State's argument were accepted, Congress broad remedial powers would be negated and laws would be limited only to constitutional violations and only to those proven in the legislative history.

Finally, the State's argument would necessarily require the judiciary to make an arbitrary choice as to the level of abstraction at which to state the inquiry. Under the State's approach, should the focus be on whether Congress found pervasive discrimination in licensing of doctors; or licensing of all health professionals; or licensing of all professionals; or all who receive licenses from the State; or all who receive benefits from the State?

States would always argue for the level of specificity required to avoid being covered by congressional findings of prior discrimination. If successful, this gambit could preclude statutory liability even in a field—somewhat more broadly defined—where the history of state discrimination is glaring and thoroughly documented. This is because Congress never makes specific findings of the kind demanded by the Petitioner at the level of detail that Petitioner also insists that the Constitution requires. For the Court to impose such a requirement on Congress would raise serious separation of powers concerns. *See, e.g., FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (emphasizing that it is not for the courts "to judge the wisdom, fairness or logic of

legislative choices.") At the very least, the State's approach, having this Court focus only on whether discrimination against individuals with disabilities in medical licensing is within the scope of Congress's section five powers, would significantly change the law and would be the antithesis of the "judicial avoidance" urged by the Medical Licensing Board. Pet. Br. at 15, citing *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944); *Ashwander v. T.V.A.*, 297 U.S. 288, 345-348 (1936) (Brandeis, J, concurring).

The Amicus Brief filed by Commonwealth of Virginia would go even further in limiting Congress's powers. The Amicus Brief contends that the "examination of Congressional findings should be limited to the statutory text." Brief of the Commonwealth of Virginia, at 6. The claim is that Congress must put findings of pervasive discrimination in the text of the statute itself or forfeit its section five authority. *Id.* at 8. This, too, is an approach lacking support from any prior decision of this Court or any other court. In each recent case concerning the scope of Congress's section five powers, this Court has reviewed the legislative history to determine whether Congress documented pervasive discrimination and whether the statute was proportionate and congruent as a preventative and remedial measure. In *Kimel v. Florida Board of Regents,* 528 U.S. at 88, this Court explained that "[o]ne means by which we have made such a determination in the past is by examining the legislative record containing the reasons for Congress' action."

Under the ruled urged by Amicus, scarcely any federal law would fall within the scope of section five because statutory provisions regulate conduct; text rarely comes packed with detailed findings in support of itself. The Amicus brief takes general discussions about the role of legislative history in statutory interpretation and applies them to a very different context where they have no relevance: whether Congress

found a sufficiently pervasive pattern of unconstitutional action to justify a statute under section five of the Fourteenth Amendment.

Moreover, the ADA is unusual among federal laws in that Congress did include within it explicit findings about widespread discrimination against individuals with disabilities by state and local governments in their services, programs, and activities. The ADA declares Congress's finding that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). The statute itself states that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3). The ADA, in its statutory provisions, is quite specific as to the forms of unconstitutional discrimination against Americans with disabilities:

> [Persons with disabilities] encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities. 42 U.S.C. § 12101(a)(5).

Based on these findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the Fourteenth Amendment" as the basis for enacting the ADA. 42 U.S.C. § 12101(b)(4).

The Virginia Amicus Brief also advances another novel argument to limit Congress's powers: that a federal law preventing and remedying discrimination can be applied only to those states that Congress specifically finds have engaged in unconstitutional conduct. Virginia Amicus Br. at 11. This would require Congress, in acting under section five, to study every state and to make specific findings of discrimination as to each and every state. Again, nothing in any decision of this Court or any court provides support for such a limit which would enormously restrict the ability of Congress to act under section five of the Fourteenth Amendment. Quite the contrary, this Court has been clear that if Congress finds pervasive constitutional violations, it may adopt a law with national application to prevent and remedy the problem so long as the law is proportionate and congruent. *See Oregon v. Mitchell,* 400 U.S. 112, 147 (1970) (Douglas, J., concurring); 216 (Harlan, J., concurring); 236 (Brennan, J., concurring); 283-84 (Stewart, J., concurring) (eight Justices concluded that Congress may enact prophylactic legislation that applies nationally under section five even though Congress lacks evidence that every state has or is likely to engage in unconstitutional behavior). Indeed, the position of the Virginia Amicus would be quite offensive from the perspective of federalism, as Congress, in order to legislate, would have to make detailed findings about each state and label each a constitutional violator.

Nor is there any support for the contention of the Virginia Amicus that Congress must restrict laws properly enacted under section five of the Fourteenth Amendment to a limited period of time. Virginia Amicus Brief, at 12. This Court, for example, has upheld Title VII of the 1964 Civil Rights Act as valid legislation under section five even without any limit in terms of the law's duration. *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976); *see also Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding provisions of the Voting Rights Act as valid under section five without any limit in duration). Nor

does the State provide any basis for implementation of such a requirement. Would Congress have to renew the findings every six months or every year or every five years?

The approach urged by the Medical Licensing Board and its amicus is a thinly veiled attempt to prevent Congress from legislating under section five at all. Taken together, they would require that the *text* of a statute detail findings of unconstitutional actions for *every* application and for *each* state being regulated. Such arbitrary limits on Congress's power have no basis under section five of the Fourteenth Amendment, principles of Article III, or the system of separation of powers envisioned by the Constitution.

In *Garrett*, this Court prescribed the inquiry to be followed in determining whether Title II of the ADA is within the scope of Congress's section five powers: "[I]n order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States, which violates the Fourteenth Amendment, and the remedy imposed by Congress must be proportionate and congruent to the targeted violation." 531 U.S. at 374. Therefore, the key questions in this case are: Is there a pattern of unconstitutional discrimination against individuals with disabilities by state governments in their services, programs, or activities? Is Title II of the ADA a proportionate and congruent means to prevent and remedy these constitutional violations?

B. Title II Was Enacted To Prevent and Remedy Pervasive Constitutional Violations By State Governments

1. *Title II Prevents and Remedies Discrimination Against Individuals with Disabilities in the Exercise of Fundamental Rights*

In. *Garrett*, this Court stated that "[t]he first step in applying these now familiar principles is to identify with some precision the scope of the constitutional right at issue."

531 U.S. at 365. Title II of the Americans with Disabilities Act is a response to pervasive discrimination against individuals with disabilities in the exercise of many constitutional rights that warrant heightened scrutiny under long-standing decisions of this Court. As described above, the text of the ADA is clear that the law is directed at unconstitutional government conduct in areas implicating basic rights "in such critical areas as . . . education, . . . communication, . . . institutionalization, . . . voting, and access to public services." 42 U.S.C. § 12101(a)(3).

In *Kimel*, 528 U.S. at 83, and *Garrett*, 531 U.S. at 366, the Court emphasized that it was dealing with types of discrimination, age and disability, that receive only rational basis review under equal protection in the context of employment decisions by a state. In contrast, discrimination with regard to fundamental rights—a central focus of Title II of the ADA—triggers strict scrutiny. This Court long has held that "classifications affecting fundamental rights are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

For example, countless cases hold that discrimination with regard to voting, an express concern of Congress in enacting Title II, warrants strict scrutiny. *See, e.g., Dunn v. Blumstein,* 405 U.S. 330, 334-35 (1972); *Reynolds v. Sims,* 377 U.S. 533, 565-68 (1964). Likewise, infringements of the right to travel for individuals with disabilities, another explicit area identified by Congress in Title II, receive strict scrutiny. *See, e.g., Shapiro v. Thompson*, 394 U.S. at 638 (since "the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest.")

Congress in adopting Title II also sought to prevent and remedy the unjustified institutionalization of individuals with disabilities and the violation of the fundamental right to be free from unreasonable confinement. *See Olmstead v. L.C.*, 527 U.S. 581 (1999); *Youngberg v. Romeo*, 457 U.S. 307

(1982). As described below, Congress found extensive discrimination against people with disabilities in the exercise of basic liberties, such as the right to marry, the right to procreate, and the right to custody of their children, which also warrant strict scrutiny. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978) (the right to marry as a fundamental right); *Stanley v. Illinois*, 405 U.S. 645 (1972) (the right to custody of one's children as a fundamental right); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (the right to procreate as a fundamental right).

Most profoundly, Title II is about ensuring that Americans with disabilities have the same access to their government as all other citizens. In many contexts, this Court has recognized the fundamental importance of every person having access to his or her government. *See, e.g., Romer v. Evans*, 517 U.S. at 633 (declaring that it is "[c]entral both to the rule of law and to . . . equal protection" that the government be available on an equal basis "to all who seek its assistance"); *McDonald v. Smith*, 472 U.S. 479 (1985) (the right to petition government for redress of grievances); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (right of access to the courts). By prohibiting discrimination against individuals with disabilities in "services, programs, or activities," Title II, above all, is concerned with ensuring that individuals with disabilities have full and complete access to their governments.

2. *Congress Documented a Pervasive Pattern of Historic and Continuing Unconstitutional Discrimination Against Individuals with Disabilities in Government Services, Programs, and Activities*

In *Garrett*, this Court stated: "Once we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional employment discrimination." 531 U.S. at 368. As Justice Kennedy explained: "The predicate for

money damages against an unconsenting State in suits brought by private persons must be a federal statute enacted upon the documentation of patterns of constitutional violations committed by the State in its official capacity." *Id.* at 376 (Kennedy, J., concurring).

Title II is fundamentally different from Title I, considered in *Garrett*, because Congress made express findings, supported by extensive documentation, of "pervasive" unconstitutional discrimination against individuals with disabilities in government services, programs, and activities. 42 U.S.C. § 12101(a)(2). Indeed, in *Garrett,* this Court contrasted the lack of a documented history of discrimination in employment by the states (the focus of Title I), with the congressional record detailing discrimination by the states in providing public services (Title II). 531 U.S. at 371 n.7 (observing that "the overwhelming majority of these accounts of constitutional violations by the States concern "discrimination by the States in the provision of public services and accommodations.")

In *Garrett,* this Court emphasized that "had Congress truly understood this information [concerning employment discrimination] as reflecting a pattern of unconstitutional behavior by the States, one would expect some mention of the conclusion in the Act's legislative findings. There is none." *Id.* at 371. In clear contrast, Congress made express findings of persistent discrimination in "public services." 42 U.S.C. § 12101(a)(3). Unlike employment, where Congress made a finding for private employment, but no analogous finding for public employment, 531 U.S. at 371, the text of Title II includes explicit findings of persisting discrimination in "education, . . . institutionalization, . . . voting, and access to public services." 42 U.S.C. § 12101(a)(3).

The legislative history which the Court found lacking for Title I is altogether different for Title II, in that it contains extensive documentation of widespread state government

discrimination against Americans with disabilities with regard to government services, programs, and activities. The Court recognized exactly this distinction in *Garrett*. As Justice Breyer observed in his dissent in *Garrett*, "[t]here are roughly 300 examples of discrimination by state governments themselves in the legislative record [of the ADA]." 531 U.S. at 379 (Breyer, J., dissenting). But the Court's opinion in *Garrett* responded that "[t]he overwhelming majority of these accounts pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Title II and III of the ADA." 531 U.S. at 370 n.7. In other words, the *Garrett* Court found that the vast majority of Congress's specific evidence of discrimination supported Titles II and III as valid exercises of Congress's authority under section five of the Fourteenth Amendment.

In enacting Title II, Congress exercised its unique institutional capacity "to amass the stuff of actual experience and cull conclusions from it." *United States v. Gainey*, 380 U.S. 63, 66-67 (1965). The ADA was the result of more than 20 years of hearings and investigations into the pervasive discrimination against individuals with disabilities. With respect to the ADA alone, Congress held 16 committee hearings and 63 field hearings, issued five committee reports, and engaged in prolonged floor debate. S.Rep. No. 116, 101st Cong., 1st Sess., 4-5, 8-9 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. II at 24-28, 31 (1990). After two years of fine-tuning in committee and floor deliberations, the ADA was passed a vote of 91-6 in the Senate and 377-28 in the House.

Congress, in enacting the ADA, found that, both historically and now, individuals with disabilities are subjected to "widespread and persisting deprivation of [their] constitutional rights." *Florida Prepaid Postsecondary Ed. Bd. v. College Savings Bank*, 527 U.S. at 645; (the "propriety of any § 5 legislation must be judged with reference to the historical

experience . . . it reflects" *id.* at 640.) For example, with regard to voting, Congress heard that "in the past years people with disabilities have been turned away from the polling places after they have been registered to vote because they did not look competent." 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act*, 100th Cong., 2d Sess. 1220 (1990) (hereafter, "Legis. Hist.") The legislative history documents that many persons with disabilities "cannot exercise one of [the] most basic rights as an American" because polling places were not accessible to persons with disabilities. S.Rep. No. 116 at 12. In fact, a study found that 21% of polling places were inaccessible to individuals with disabilities in the 1988 elections and 27% were inaccessible in the 1986 elections. Federal Election Commission, *Polling Place Accessibility in the 1988 General Election* 7 (1989). A hearing on discrimination with regard to voting is filled with specific examples of individuals with disabilities being denied their constitutionally guaranteed right to vote. *Equal Access to Voting for Elderly and Disabled Persons,* Hearings Before the Task Force on Elections of the House Comm. on House Admin., 98th Cong., 1st Sess. (1984).

Overall, the United States Civil Rights Commission, in a report extensively relied on by Congress in enacting the ADA, found that people with disabilities are "frequently denied . . . the right to vote" and face barriers such as "state laws restricting voting rights of mentally handicapped persons," "the denial of opportunity for institution residents to vote," "architectural barriers at polling places," the "absence of assistance in ballot marking," the "inequity of absentee ballots," and "restrictions on rights of handicapped persons to hold public office." Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* 40 (1983); *see also* 135 Cong. Rec. S10753 (daily ed. Sept. 7, 1989) (Sen. Gore) (summarizing testimony and concluding "[a]s a prac-

tical matter, many Americans with disabilities find it impossible to vote.")

Similarly, Congress documented that those with disabilities were frequently unconstitutionally deprived of their right of access to the courts and to their government. The legislative history documents that "[t]he courthouse door is still closed to Americans with disabilities—literally." 2 Legis. Hist. 936 (Sen. Harkin). More generally, the legislative history carefully shows that government buildings, including courthouses, were inaccessible to individuals with disabilities, thus denying their basic right of access to government. The Civil Rights Commission's study found that 76% of State-owned buildings were inaccessible to persons with disabilities. Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* at 39. Congressional committees heard testimony of "innumerable complaints regarding lack of access to public service—people unable to meet with their elected representatives because their district office buildings were not accessible or unable to attend public meetings because they are held in an inaccessible building." *Americans with Disabilities Act of 1989,* Hearings on S.933 Before the Sen. Comm. on Labor and Human Res. And the Subcomm. on the Handicapped, 101st Cong., 1st Sess. (1989) (testimony of Illinois Attorney General Neil Hartigan). The legislative history, especially the field hearings, is replete with examples of individuals who could not attend court hearings or government meetings because entrances were not accessible for individuals with disabilities. *See, e.g.,* Alabama submission, at 17; Alaska submission, at 73; Indiana submission, at 626; Wisconsin submission, at 1758; Wyoming submission, at 1786. These are examples of clearly unconstitutional acts of state and local governments in denying individuals with disabilities access to their government.[3]

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[3] In *Garrett*, this Court held that examples of employment discrimination by local governments were not relevant in assessing whether

A particularly important example of pervasive unconstitutional state government actions that motivated the enactment of the ADA is the impermissible confinement of individuals with disabilities. The legislative history of the ADA recounts numerous instances of individuals with disabilities being unconstitutionally confined and institutionalized. Indeed, the "Findings and Purposes" section at the beginning of the ADA, 42 U.S.C. § 12101(a)(2)(3), mentions persistent unjustified "institutionalization" of people with disabilities. The Senate Report on the ADA explains that "[h]istorically, individuals with disabilities have been isolated and subjected to discrimination and such isolation and discrimination is still pervasive in our society." S.Rep. No. 116 at 6. Senator Harkin, in introducing the ADA, said that one of its key purposes is "getting people . . . out of

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there was an adequate record of discrimination by state governments. 531 U.S. at 368-369. However, in assessing discrimination in government services, programs, and activities, this Court should consider evidence of constitutional violations by local governments because often local governments are acting as arms of the state government in providing particular services, programs, and activities. *See, e.g., McMillian v. Monroe County*, 520 U.S. 781, 795 (1997) (Alabama county sheriff is a part of the state); *Pennhurst State School & Hospital v. Halderman*, 485 U.S. 89, 124 (1984) (administration of mental hospital by local government is a state government function); *Belanger v. Madera Unified School Dist.*, 963 F.2d 248 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993) (California school districts are arms of the state and protected by the Eleventh Amendment). Many of the government functions covered by Title II devolve to local governments because states delegate these tasks. Congress surely would not need to examine the laws of each state to determine when the local government was operating as a part of the state. Rather, in this area, findings of local government violations of the constitutional rights of people with disabilities should be considered in evaluating the overall proof of pervasive discrimination. Also, it should be noted that the vast majority of areas considered—voting, access to courts and government buildings, impermissible confinement, violations of the rights to marry, procreate and custody, and licensing—involve *state* governments.

institutions." 135 Cong. Rec. S4986 (daily ed. May 8, 1989); *see also* 136 Cong. Rec. H2477 (daily ed. May 17, 1990, Congressman Miller, co-sponsor of the ADA) ("[s]ociety has made [people with disabilities] invisible by shutting them away in segregated facilities.")

The report of the United States Commission on Civil Rights, quoted extensively in the House and Senate Reports, discussed in detail the unconstitutional confinement of individuals with disabilities. The Civil Rights Commission described how historically individuals with disabilities have been needlessly isolated from the rest of society and confined, first at the hands of people who collected fees for their care and "locked their charges in the attic to starve or freeze to death;" then in unsanitary and overcrowded almshouses that generally did not provide care but were "merely custodial"; then in large state facilities that came to see their purpose as protecting society from people with disabilities as these individuals came to be seen as "sub-standard human creatures" and "waste products" during the growth of the eugenics movement. *Id.* at 17-20. The Civil Rights Commission report detailed the continuing unnecessary segregation and institutionalization of people with disabilities: "The harshest side of institutionalization is the systematic placement of handicapped people in substandard residential facilities, where incidents of abuse by staff and other residents, dangerous physical conditions, gross underfunding, overuse of medication to control residents, medical experimentation, inadequate and unsanitary food, sexual abuses, use of solitary confinement and physical restraints, and other serious deficiencies and questionable practices have been reported." *Id.* at 41.

Despite repeated calls for deinstitutionalization and integration of people with disabilities in society, widespread confinement continued. The Civil Rights Commission found: "Despite such initiatives, a great many handicapped persons

remain in segregative facilities. The Comptroller General has estimated that about 215,000 persons were residing in public mental hospitals in 1974 and that some 181,000 persons were in public institutions for mentally retarded people as of 1971. In 1976, one study estimated that 1,550,120 people were in long term residential care facilities." *Id.* at 35. This Court, of course, has found that individuals with disabilities have a fundamental right to freedom from undue restraint. *Youngberg v. Romeo*, 457 U.S. at 324 (also recognizing a right to minimally adequate treatment); *see also O'Connor v. Donaldson*, 422 U.S. 563 (1975). The legislative history of Title II describes investigations of State-run mental health facilities which found conditions that "were appalling. The extent of neglect and abuse uncovered in their facilities was beyond belief." 132 Cong. Rec. S5914 (1986) (Sen. Kerry).

Congress also intended Title II to prevent and remedy violations of fundamental rights to marry, to procreate, and to custody of one's children. Congress was acutely aware of the tragic history of the eugenics movement in which states attempted to halt reproduction of people with disabilities and "nearly extinguish their race." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 462 (1985) (Marshall, J., concurring). In fact, almost every state prohibited marriage and inflicted forced sterilization on individuals with disabilities. *Id.* at 463. *See Buck v. Bell,* 274 U.S. 200, 207 (1927) (upholding compulsory sterilization "in order to prevent our being swamped with incompetence" and because "three generations of imbeciles is enough.")

Nor were such violations of the basic rights to marry and procreate a thing of the past. The Civil Rights Commission report relied on by Congress noted that fifteen states continued to have compulsory sterilization laws on the books, four of which included persons with epilepsy. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, at 37. Congress was aware that such abhorrent

practices continued. *See Stump v. Sparkman,* 435 U.S. 349, 351 (1978) (Indiana judge ordered the sterilization of a "somewhat retarded" 15 year-old girl). The Commission also found that "[m]any states restrict the rights of physically and mentally handicapped people to marry." Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities,* at 40.

The legislative history describes how "[h]istorically, child-custody suits almost always have ended with custody being awarded to the non-disabled parent." 2 Leg. Hist. 1611 n.10 (Arlene Mayerson). The House Report described discriminatory policies against individuals with disabilities in "securing custody of their children." H.R. Rep. No. 485, at 41. The Civil Rights Commission found that many parents with disabilities "have had custody of their children challenged in proceedings to terminate parental rights and in proceedings growing out of divorce." Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* at 40.

Yet another area where Congress found pervasive unconstitutional treatment of individuals with disabilities was with regard to police conduct. The legislative history of Title II is filled with examples of police violating the rights of people with disabilities. The legislative history describes how persons with disabilities, such as epilepsy, are "frequently inappropriately arrested and jailed" and "deprived of medications while in jail." H.R. Rep. No. 485, at 50. Countless examples exist of situations such as police in Kentucky learning that an arrestee was HIV-positive and "[i]nstead of putting the man in jail, officers locked him inside his car to spend the night." 2 Leg. Hist. 1005 (Brenda Mason). The legislative history documented how police "do not provide crime prevention, apprehension, or prosecution because they see it as fate that Americans with disabilities will be victims." *Id.* at 1197 (Cindy Miller). To cite but one example, the

legislative history describes how the police refused to accept a rape complaint from a blind woman because she could not provide a visual identification of her assailant. New Mexico submission, at 1081.

Education is one of the most egregious areas of discrimination against individuals with disabilities and also is expressly mentioned in the "Findings and Purposes" section at the beginning of the ADA, 42 U.S.C. § 12101(a)(2)(3). This Court has spoken eloquently of how "education is perhaps the most important function of state and local governments" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). While inequalities in the financing of education do not necessarily violate equal protection, *see San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), the complete denial of education is unconstitutional. *Id.* at 37 ("absolute denial" of education different from inequalities in funding); *Plyler v. Doe*, 407 U.S. 202 (1982) (absolute denial of education to children of undocumented aliens who could not pay tuition unconstitutional). The legislative history of the ADA describes many examples of children being totally excluded from school because they had AIDS, 136 Cong. Rec. H2480 (daily ed. May 17, 1990) (Rep. McDermott) (describing the exclusion of Ryan White from school); or were in a wheelchair, California Att'y Gen., *Commission on Disability: Final Report* 17, 81 (Dec. 1989); or had conditions such as cerebral palsy, Vermont submission, at 1635.

Indeed, the Civil Rights Commission report found that "a great many handicapped children continue to be excluded from the public schools, and others are placed in inappropriate programs," Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, at 29. The Civil Rights Commission concluded that this continued despite the

enactment of the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1400, *et. seq.*, which was designed to remedy these concerns. The legislative history documents the profound consequences of this discrimination: only 29% of persons with disabilities attend college, compared to 48% of the non-disabled population. National Council on the Handicapped, *On the Threshold of Independence* 14 (1988).

In addition to finding widespread violations of fundamental rights by state governments, Congress also determined that there was pervasive irrational, unjustified discrimination against persons with disabilities in every aspect of government services, programs, and activities. The legislative history contains countless examples, such as a zoo keeper refusing to admit children with Down Syndrome "because he feared they would upset the chimpanzees," S. Rep. No. 116, *supra*, at 7, and a paraplegic Vietnam veteran being forbidden to use a public pool in New York and being told by a park commissioner, "[I]'s not my fault that you went to Vietnam and got crippled." 3 Leg. Hist. 1872 (Peter Addesso). Although, of course, there is not a fundamental right to use a zoo or a park, these governments actions are unconstitutional discrimination even under a rational basis test. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (holding that a city's zoning ordinance which discriminated against individuals with disabilities failed rational basis review and was unconstitutional).

In fact, contrary to the assertion of the Medical Licensing Board, Pet. Br. at 16, the legislative history of Title II expressly discusses discrimination in licensing, and, in fact, the statute itself identifies "exclusionary qualification standards" as a continuing form of discrimination against people with disabilities. 42 U.S.C. § 12101(a)(5); Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* at 40; 2 Leg. Hist. at 1186 (testimony of Linda Mills.) For example, the legislative history discusses individ-

uals such as Judy Heumann who was denied a teaching license because of polio. S. Rep. No. 116, *supra*, at 7. Congress undoubtedly was aware of cases concluding that state governments had engaged in discrimination against individuals with disabilities in licensing that was so unjustified as to be unconstitutional, even assuming that no form of heightened scrutiny applies to this state function. *See, e.g., Pushkin v. Regents of the University of Colorado,* 658 F.2d 1372 (10th Cir. 1981) (doctor unconstitutionally denied a residency because of multiple sclerosis).

This brief description of the discussion of unconstitutional government action in the legislative history of the ADA only touches the surface of the pervasive violations of rights found in 16 congressional committee hearings, 63 field hearings, five committee reports, numerous reports of government commissions, and tens of thousands of pages of testimony. The description, however, is sufficient to establish that Congress found overwhelming evidence of widespread violations of the constitutional rights of individuals with disabilities, including basic rights guaranteed by the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.

Nor, of course, is this Court limited to just congressional findings in concluding that unconstitutional discrimination against Americans with disabilities is pervasive in state government services, programs, and activities. *Turner Broadcasting System, Inc. v. Federal Communication Commission,* 520 U.S. 180, 200, 209, 211-213 (1997) (courts may consider evidence outside the legislative record in evaluating Congress's exercise of legislative power); *Conroy v. Aniskoff*, 507 U.S. 511, 516 n.10 (1993) (courts should presume that Congress is aware of relevant legal precedents). Thus, this Court may note, as Congress undoubtedly did, the many judicial decisions declaring state violations of the rights of individuals with disabilities unconstitutional. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307 (1982) (finding uncon-

stitutional conditions of confinement for individuals with mental disabilities at a state institution); *Parrish v. Jackson,* 800 F.2d 600, 603 (6th Cir. 1986) (prison guard assaulted paraplegic inmate with a knife and did not provide minimal sanitation needs); *Doe v. Gallinot,* 657 F.2d 1017 (9th Cir. 1982) (unconstitutional confinement of a person with disabilities); *Cameron v. Tomes,* 990 F.2d 14 (1st Cir. 1993) (unconstitutional denial of treatment for a person with disabilities); *Panitch v. Wisconsin*, 444 F.Supp. 320, 322 (E.D. Wis. 1977) (unconstitutional discrimination in education); *Goldy v. Beal*, 429 F.Supp. 640 (M.D.Pa. 1976) (unconstitutional confinement of individuals with disabilities); *Mills v. Board of Education*, 348 F.Supp. 866, 870 (D.D.C. 1972) (unconstitutional discrimination in education); *Wyatt v. Stickney*, 344 F.Supp. 387, 391 (M.D. Ala. 1972) (finding conditions for housing individuals with disabilities "grossly substandard"); *Dixon v. Attorney General,* 325 F.Supp. 966 (M.D.Pa. 1971) (unconstitutional procedures for confining people with disabilities). This Court, prior to the enactment of the ADA, spoke of "well-catalogued instances of invidious discrimination against the handicapped." *Alexander v. Choate*, 469 U.S. 287, 295 n.12 (1985).

Unconstitutional discrimination against people with disabilities by state governments is not a relic of the past. For instance, unconstitutional violations of the right to vote of individuals with disabilities persists. *See, e.g., Doe v. Rowe*, 156 F.Supp.2d 35, 38 n.2 (D.Me. 2001) (constitutional violation in denying the right to vote to people with disabilities); *New York v. County of Delaware,* 82 F.Supp.2d 12 (N.D.N.Y. 2000) (polling places in two counties were inaccessible to individuals with disabilities). A study in 2000 found that only 27% of Philadelphia's 1,681 polling places were accessible to people with disabilities. General Accounting Office, Voters With Disabilities—Access to Polling Places and Alternate Voting Methods (2001). The study

found that overall, 84% of the polling places that it examined had at least one impediment which could hinder persons with disabilities from casting their ballot.

Likewise, courts continue to find that state governments engage in impermissible discrimination against Americans with disabilities in professional licensing. *See, e.g., Bartlett v. New York State Board of Law Examiners*, 226 F.3d 69 (2d. Cir. 2000); *Clark v. Va. Bd. of Bar Examiners,* 880 F.Supp. 430 (E.D. Va. 1995); *In re Petition of Kara B. Rubenstein*, 637 A.2d 1131 (Del. 1994); *In re Petition of Frickey*, 515 N.W.2d 741 (Minn. 1994). *See generally,* Emily Bazar, *State Agencies Lag Badly in Complying with a 1995 Deadline to Provide Full Access,* Sacramento Bee, June 17, 2001, at A1 ("a survey of the state's [California's] 10 largest departments shows that California government clearly violates the 1990 Americans with Disabilities Act and is at least a decade away from ensuring that the public has unencumbered access to its programs and facilities.")

Nor, contrary to the Medical Licensing Board's assertion, are state laws adequate to protect the fundamental rights of Americans with disabilities. In 1990, when the ADA was adopted, 26 states failed to provide any statutory protection against state discrimination against individuals with disabilities with respect to government services and activities. Ruth Colker & Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075, 1092, 1113 (2002). Many state laws which did exist had significant limitations. For example, the Medical Board of California boasts that "California's own statutory prohibition against discrimination in licensure on the basis of disability antedated the ADA by eight years." Pet. Br. at 28 n.9 (citing Cal. Gov. Code § 12944). However, as originally enacted in 1980, § 12944 covered only "physical handicap and medical condition" in providing protection for individuals with disabilities. It was

only in 1992, after the passage of the ADA and prompted by it, that § 12944 was amended to include mental disability protection, the focus of this case.

In fact, a recent study of laws in all 50 states found that even now, nine states have no enforcement mechanism against the state for discrimination against individuals with disabilities and only twenty-four states have statutes comparable to the protections found in Title II including the availability of monetary relief against the government. Colker & Milani, *supra*, at 1075.

Thus, by any measure, Congress documented the need for action under section five of the Fourteenth Amendment by finding pervasive constitutional violations of the rights of individuals with disabilities who often lack any meaningful remedy.

3. *Title II is Thus Distinguishable from Other Statutes that this Court has Determined to Be Outside the Scope of Congress's Section Five Powers*

Title II of the ADA is very different from Title I and from the Age Discrimination in Employment Act (ADEA), which this Court held in *Garrett* and *Kimel*, respectively, were not within the scope of Congress's section five powers. First, Title II is directed only at the government and at its basic functions as a government in providing "services, programs, or activities." Title I and the ADEA regulate employment for both government and private employers. This Court has noted the basic difference between the government acting as a sovereign as opposed to as an employer. *See, e.g., Board of County Commissioners v. Umbehr,* 518 U.S. 668, 676 (1996); *O'Connor v. Ortega*, 480 U.S. 709, 724 (1987). When the government acts as the sole judge of fitness to practice medicine it acts in a different capacity than when it hires doctors.

A doctor rejected by one emergency room has other potential employment as a physician; a doctor denied a medical license has no recourse and no ability to practice medicine.

Second, employment discrimination against individuals with disabilities and the elderly, the focus of Title I and of the ADEA, receives only rational basis review. This was a crucial aspect of this Court's analysis in both *Garrett* and *Kimel* and a basis for the conclusion that these laws were not within the scope of Congress's section five powers. In contrast, as discussed above, Title II, in large part, is concerned with violations of the fundamental rights which trigger strict scrutiny.

Third, the legislative history for Title II is vastly different from that for Title I or for the ADEA. In *Garrett*, the Court stressed the absence of congressional findings of discrimination in employment and that there were only six examples of unconstitutional state discrimination in employment in the legislative history. 531 U.S. at 369. In sharp contrast, as detailed above, Congress, in the text of the ADA and in the legislative history, made explicit findings of pervasive unconstitutional discrimination in areas such as voting, access to government, and institutionalization. The legislative history is filled with countless examples of state governments unconstitutionally violating the rights of people with disabilities.

In all of these ways, Title II is very similar to the Voting Rights Act, which the Court in *Garrett* identified as a model of permissible legislation under section five of the Fourteenth Amendment. 531 U.S. at 373. Title II, like the Voting Rights Act, was enacted only after "Congress explored with great care the problem" of constitutional violations. *Id.* (citation omitted). In both Title II and the Voting Rights Act, "Congress documented a marked pattern of unconstitutional action by the States." *Id.* The Court in *Garrett* emphasized the statistical proof before Congress in enacting the Voting

Rights Act. *Id.* As described above, Congress had similar statistical evidence of inequalities for Americans with disabilities in areas such as voting, access to government buildings, and education. Title II, like the Voting Rights Act, is directed only at governments and is a response to "a pattern of discrimination by the states which violates the Fourteenth Amendment." *Id.* at 374.

C. Title II Is a Proportionate and Congruent Means to Prevent and Remedy Constitutional Violations

1. *The Prohibition of Discrimination Against Individuals with Disabilities in Government Services, Programs, and Activities is Proportionate and Congruent to Preventing and Remedying Pervasive Constitutional Violations Found by Congress*

Having found widespread unconstitutional state government actions against individuals with disabilities with regard to numerous basic rights, it was necessary and appropriate for Congress to prohibit discrimination in government "services, programs, or activities." Title II thus meets the requirement that this Court has imposed that legislation under section five "be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne v. Flores*, 521 U.S. at 532.

Unquestionably, Title II has a broad scope, but that is warranted—"proportionate" and "congruent"—to the pervasive constitutional violations documented in the legislative history. As this Court expressed, "[t]he appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Id.* at 530. Indeed, it is difficult to imagine how Congress could have written a narrower statute to deter and remedy the

widespread unconstitutional actions found by Congress. As this Court has explained, when Congress uncovers "a significant pattern of unconstitutional discrimination," Congress has "reason to believe that broad prophylactic legislation is necessary." *Kimel v. Florida Board of Regents,* 528 U.S. at 91.

2. *Title II Is Carefully Tailored in that it Applies Just to "Qualified Individuals" Who Meet "Essential Requirements" and it Requires Only that the Government Act Reasonably*

The key question in evaluating "proportionality" and "congruence" is whether Title II was "designed to guarantee meaningful enforcement" of constitutional rights. *Garrett,* 531 U.S. at 373. Title II does exactly this. Title II prohibits *unreasonable* discrimination against people with disabilities. The States retain their discretion to exclude persons from programs, services or benefits for any lawful reason unconnected with their disability. More importantly, Title II is limited to protecting individuals who are "otherwise qualified." 42 U.S.C. § 12132(2). This is defined as an "individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . *meets the essential eligibility requirements* for the receipt of services or the participation in the programs or activities provided by a public entity." *Id.* (emphasis added). Thus, in the context of medical licensing, a state never would have to issue a license to a doctor who cannot meet the state's standards for competent performance or who, in any way, would endanger the public. *See* Laura F. Rothstein, *The Americans with Disabilities Act: A Ten Year Retrospective*, 52 Ala. L. Rev. 241, 262 (2000) ("behavior and performance deficiencies are not excused [by medical licensing boards], even if they relate to disability.") But nor can a state deny a medical license to an individual with disabilities who otherwise meets "the essential eligibility requirements," which is exactly what Dr.

Hason alleges here.[4] Title II carefully balances a state's legitimate interests against the right of a person with a disability to be judged "by his or her own merit and essential qualities." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000).

Title II therefore prohibits more than the Constitution only to the extent that some disability discrimination may be rational for constitutional purposes, but unreasonable under the statute. This difference is surely not enough for a conclusion that Title II lacks "proportionality" or "congruence," especially in light of this Court's repeated statements of the need for deference to Congress in determining whether laws are permissible under section five. *See Kimel v. Florida Board of Regents*, 528 U.S. at 81 (Court has accorded Congress "wide latitude" under section five); *City of Boerne v. Flores*, 521 U.S. at 518 (directing courts to defer to Congress on congruence and proportionality review). The difference between the Constitution and the statute is needed because "[a] proper remedy for an unconstitutional exclusion . . . aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *United States v. Virginia*, 518 U.S. 515, 547 (1996). A statute limited to providing a remedy for constitutional violations would not have the needed prophylactic effect of deterring government from engaging in conduct that risks infringing the rights of individuals with disabilities.

Nor does Title II's requirement for reasonable accommodation for individuals with disabilities negate it being proportionate and congruent. The Constitution itself requires that the government act to accommodate individuals with disabilities, such as in ensuring that polling places are

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[4] Obviously, if Dr. Hason prevails in this Court, that does not mean that he automatically will receive his medical license or damages. All it means is that Dr. Hason has a cause of action and his day in court. If the State can prove that Dr. Hason was not "qualified" to practice medicine, it will prevail at trial.

accessible, translators are available in court for the hearing impaired, and that necessary treatment in an appropriate setting is provided to those in a state's care. This, too, is an important distinction between Title II and Title I of the ADA. In *Garrett*, this Court emphasized that congruence and proportionality were of particular concern under Title I because "the accommodation duty [under Title I] far exceeds what is constitutionally required." *Garrett,* 531 U.S. at 372. But unlike employment, the Constitution mandates affirmative government actions to accommodate individuals with disabilities in the exercise of many fundamental rights.

Moreover, Title II requires only reasonable modifications that would not fundamentally alter the nature of the service provided and only when the individual seeking modification is otherwise eligible for the service. 42 U.S.C. § 12131(2); *Olmstead v. L.C.*, 527 U.S. at 603 (explaining that states may take into account cost and available resources in determining whether and how to accommodate individuals with disabilities under Title II). In fact, Congress expressly found that the vast majority of these accommodations entail little or no cost to the government. S. Rep. No. 116, *supra*, at 10-12, 89, 92; H.R. Rep. No. 485, *supra*, pt. 2, at 34.

Although Title II prohibits somewhat more than just what would violate the Constitution, this Court has been clear that it is permissible for a law enacted under section five to do so. The Court has stated that Congress's power under section five "is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment." *Kimel v. Florida Board of Regents*, 528 U.S. at 81. This Court has stressed that "[l]egislation which deters or remedies constitutional violations can fall within the scope of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Lopez v. Monterey County*, 525 U.S. at 282-283.

3. *Damage Remedies Are Needed to Deter and Compensate Violations of Constitutional Rights*

Title II has exactly the goal identified as the central purpose of legislation under section five of the Fourteenth Amendment: to prevent and remedy constitutional violations of the rights of individuals with disabilities. This Court long has recognized that damage remedies are essential to deter constitutional infringements and to provide compensation to victims of illegal action. *See, e.g., Owen v. City of Independence*, 445 U.S. 622, 651 (1980) (emphasizing the importance of damages for deterrence and risk-spreading in the context of § 1983). Indeed, in this case, for Dr. Hason, "it is apparent that some form of damages is the only possible remedy for someone in [his] alleged position." *Bivens v. Six Unknown Names Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 409-410 (1971). Dr. Hason's complaint alleges that he has been illegally and unconstitutionally denied a medical license for the last five years. Even if he ultimately prevails in his suit for injunctive relief and receives his license, he has forever lost five years of income and experience in serving his patients. For these five years, "it is damages or nothing." *Id.*

Nor can it be assumed that injunctive relief to enforce Title II will be available if this Court holds that Title II is outside the scope of Congress's section five powers. In *Garrett*, 531 U.S. at 374 n.9, this Court, in rejecting a damage remedy against state governments to enforce Title I of the ADA, stressed the availability of injunctive relief against individual officers pursuant to *Ex parte Young*, 209 U.S. 123 (1908). But some courts have held that individual officers may not be sued to enforce Title II. *See Walker v. Snyder*, 213 F.3d 344, 346-347 (7th Cir. 2000), *cert. denied sub nom United States v. Snyder*, 531 U.S. 1190 (2001); *Lewis v. New*

Mexico Dept of Health, 94 F.Supp.2d 1217, 1230 (D.N.M. 2000) (*Ex parte Young* actions cannot be maintained under Title II because officials are not "public entities.")

In fact, if this Court concludes that Title II is not valid under section five, states certainly will argue that, unlike Title I or the Age Discrimination in Employment Act which regulate employment in both the private and public sectors, Title II does not fit within the scope of Congress's commerce clause power. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995) (narrowing the scope of Congress's commerce clause authority). Even more troubling, if Title II is not valid as legislation under section five, then states will argue that applying its mandates to state governments raises Tenth Amendment problems. *See, e.g., Printz v. United* States, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992) (finding laws enacted under the commerce power to violate the Tenth Amendment because they required states to take legislative or regulatory actions).

The reality is that state governments are aggressively challenging every application of federal civil rights laws. States already are arguing that their officers cannot be sued for injunctive relief under Title II and that they cannot be sued under other federal statutes protecting individuals with disabilities, such as Section 504 of the Rehabilitation Act. 42 U.S.C. § 2000d. *See, e.g., Garcia v. SUNY Health Sciences Ctr. of Brooklyn,* 280 F.3d 98 (2d Cir. 2001) (limiting suits against states under the Rehabilitation Act).

Simply put, Title II is an essential federal law to prevent and remedy pervasive violations of the constitutional rights of individuals with disabilities throughout government services, programs, and activities. If Title II is deemed to be outside the scope of Congress's section five powers, the nation will lose a crucial law addressing the country's "history of unfair

and often grotesque mistreatment" of persons with disabilities. *City of Cleburne v. Cleburne Living Center,* 473 U.S. at 454 (Stevens, J., concurring) (citation omitted).

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals should be affirmed.

Respectfully submitted,

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February 18, 2003

It was ordered that this case be removed from the argument calendar on March 7, 2003.